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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1528

HOWARD BAPTISTA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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HOWARD BAPTISTA,
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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner Howard Baptista prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 24, 1976.

Opinions Below.

The text of the opinion of the Court of Appeals in this case is reprinted as App. 2-28 hereto.[1] The text of the judgment is reprinted as App. 29 hereto. The trial in the District Court was by jury, and no opinion was filed by the District Court. The text of the judgment of the District Court is reprinted as App. 30-31 hereto.

[1] References to the appendix to this petition will be designated "App. ."

Jurisdiction.

The judgment of the Court of Appeals was entered on March 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

I. Did the trial judge err in instructing the jury that travel or use of the mails by a non-defendant putative victim was sufficient basis for finding a violation by the petitioner of the Travel Act, 18 U.S.C. § 1952?

II. Did the trial judge commit error and thereby violate the due process rights of the petitioner in charging the jury that the petitioner could be convicted under the Travel Act upon a finding of mere receipt by the petitioner of payments voluntarily made by the putative victim Graham thus allowing the government to proceed on inconsistent theories?

III. Were the petitioner's Fifth Amendment due process rights abridged by (1) the government's failure to comply with the District Court's discovery order; and (2) the admission of evidence through four witnesses immunized in violation of 18 U.S.C. § 6003?

Constitutional Provision and Statutes Involved.

CONSTITUTION OF THE UNITED STATES.
AMENDMENT V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The following statutes are set out in the appendix due to their length (App. 32 et seq.):

18 U.S.C. § 1951 (June 25, 1948, c. 645, 62 Stat. 793).

18 U.S.C. § 1952 (Added Pub. L. 87-228, § 1(a), Sept. 13,

1961, 75 Stat. 498, and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212).

18 U.S.C. § 2 (June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 176, 65 Stat. 717).

18 U.S.C. § 6003 (Added Pub. L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927).

18 U.S.C. § 2514 (Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216).

Statement of the Case.

The petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on March 24, 1976, affirming the convictions of the petitioner Howard Baptista. The District Court had jurisdiction over the offenses described in 18 U.S.C. §§ 2, 371, 1951 and 1952.

Prior proceedings and facts.

On March 19, 1975, a six count indictment was returned against the petitioner.

The trial.

After a trial by jury in the District Court, the petitioner was convicted on count I of having conspired to obstruct, delay and affect interstate commerce by extortion of $25,000 from Thomas A. Graham as president of Meridian Engineering, Inc., induced by the wrongful use of fear of economic loss and under the color of official right; on counts III and V of obstructing, delaying and affecting interstate commerce by extortion from Thomas A. Graham as president of Meridian Engineering, Inc. of $25,000 in 1971 and $5,000 in 1972 in violation of the Hobbs Act, 18 U.S.C. §§ 1951 and 2 (A. 8, 11, 12); on count II of having conspired to cause others to travel in

interstate commerce to carry on an unlawful activity in violation of 18 U.S.C. § 371 (A. 7); and on counts IV and VI of causing others to travel in interstate commerce and to utilize the facilities in interstate commerce to carry on an unlawful activity in violation of 18 U.S.C. §§ 1952 and 2 (A. 9, 13-14).[2]

The petitioner was sentenced to a term of two years, the first six months to be served in jail and the balance suspended with probation for 18 months, and was ordered to pay a fine of $6,000. Execution of sentence was stayed pending appeal (A. 860, 861).

At the trial there was evidence of the following:

The petitioner Howard Baptista was the executive director of the New Bedford Redevelopment Authority. The petitioner's co-defendant Stephen Hathaway was the sole proprietor of Stephen Hathaway Construction Materials Supplier Co. of West Roxbury and Manchester, Massachusetts.

Thomas A. Graham was the chairman of the board and president of Meridian Engineering, Inc. (hereinafter referred to as Meridian). Meridian was a design engineering and construction management firm with its principal office in Philadelphia, Pennsylvania (A. 48).

Graham admitted at the trial that prior to his meeting with Baptista in June, 1971, he had, systematically, as chairman of the board and president of Meridian, committed the following illegal acts:

(1) Graham disbursed $5,000 to the majority leader of the Pennsylvania House of Representatives, Joshua Eilberg, by personally delivering cash on three or four occasions, in return for a contract on Temple University (A. 591-592).

(2) Graham disbursed $25,000 total in cash to the state treasurer of New Jersey, one Kervick, for work at the New Jersey College of Medicine and Dentistry, delivering $1,000 sums in hand on approximately 25 occasions (A. 593-594).

(3) Graham disbursed $58,000 between 1970 and 1973 to a New Jersey attorney, one Colsey, who was helpful in getting jobs, deducted as attorney fee payments on Meridian tax returns (A. 603-604).

(4) Graham disbursed between $20,000 and $30,000 to the Mayor of Lancaster, Pennsylvania, in amounts of $1,000 delivered by him in cash in hand (A. 605).

When asked whether he had difficulty getting money out of the company whenever he needed it to give bribes to these people, he replied "No" (A. 608). Graham further admitted that he had developed a scheme through which Meridian got tax deductions for cash disbursements out of a so-called "administrative travel fund" (A. 598-599).

> "There were three purposes of charges that I used to make to the administrative travel account: One would be the administrative travel, the second would be political contributions or payments, and the third one would be money that I also had taken personally on occasion." (A. 595.)

The total of these three categories over the period from 1970-1972 was in excess of $715,000, all deducted from Meridian's gross income (A. 661-662). Of the three purposes stated by Graham, he admitted that the largest amount was for his personal use (A. 596).

[2] This and other references designated "A. " are to the appendix to the brief for the appellants in the United States Court of Appeals for the First Circuit. The appendix will be certified to this Court.

Meridian obtained two contracts with the New Bedford Redevelopment Authority, the first in the summer of 1971 on the West End Urban Redevelopment Project (hereinafter referred to as WEP) and the second in the summer of 1972 for the Neighborhood Development Project (hereinafter referred to as NDP) (A. 63, 121). In early 1971, Meridian worked as a subcontractor on the WEP, under the project consultant Lucas & Edwards, Inc., a firm no longer in existence at the time of trial (A. 50).

There was also evidence, if believed, of the following:

Graham met Lucas[3] on an unspecified date at which time the WEP project was discussed. On June 30, 1971, Graham and Lucas travelled to New Bedford by private plane where for the first time ever Graham spoke with and met Howard Baptista (A. 58). Either before the flight or en route, Graham developed and wrote out a schedule (A. 614-620) containing the words "invoice date," "address," and "amount," with figures adding up to $25,000 (A. 66-67, 614-619).

The subjects of discussion at the meeting were the WEP contract and methods by which payments of funds from Meridian could be disbursed to Baptista. Graham testified that he proposed to Baptista a sum of $25,000, but that he, Graham, needed a vehicle to extract money from the company (A. 66, 614-619). To this request, Graham stated that Baptista gave him four invoices of a contractor friend to use as a vehicle.

The four 1971 invoices were allegedly mailed to 59 Raymond Street, Manchester, Massachusetts. Margaret

[3] Lucas was known to the grand jury, but never testified before the grand jury or at the trial. During argument on requests for instructions, the government stipulated with defendants, and the court so charged, that the only conspiracy which could be found was between Hathaway and Baptista.

R. Hathaway, who had resided at that address for 15 years, testified that Stephen Hathaway had departed permanently from the residence in 1964 (A. 712). She had received no mail whatsoever since 1970 to the present time for Stephen Hathaway at that address (A. 712).

Of the events occurring in 1972, Graham testified about two meetings on consecutive days (A. 647). The first meeting occurred on August 2, 1972, in New York with a Mr. Jerry Sands, whom Graham used on two or three occasions as a "money laundry" (A. 643-647). On those occasions, Sands provided Graham with dummy invoices used in the following manner:

> "The arrangement proposed by the proposer, not Mr. Sands, was that Mr. Sands be instructed to type and send invoices to our company on the occasions when I would want cash, and I would then authorize disbursement of money to Mr. Sands. He would take a tax bite, defined as 35 percent and keep the balance in an account that I had opened specifically for that at the Chase Manhattan Bank in New York." (Thomas Graham, A. 645.)

On the following day, August 3, 1972, a meeting arranged by Graham between himself and Howard Baptista occurred (A. 647). Graham testified that the following events and discussions took place:

Prior to the meeting he had arranged, Graham prepared a schedule similar to the one he had prepared in 1971 (A. 137) (Ex. 3, A. 792).[4] He went to New Bedford

[4] Graham testified on five separate occasions as to the preparation of this 1972 schedule. On three of those occasions, he said he had prepared it prior to his trip; twice he said that, upon the suggestion of IRS Agent Paul Deery he could not have prepared it before (A. 627-638).

and confronted Baptista about the future award of the NDP contract. He offered to arrange a series of payments totalling $5,000 (A. 122).

There was also evidence from which the jury could find that:

The 1972 invoices had as an address for Stephen Hathaway Box 121, West Roxbury Post Office, West Roxbury, Massachusetts (Ex. 4-7, A. 793-796). The record of that post office dating back to 1969 shows that Box 121 was not assigned to Stephen Hathaway and further, that ledger containing forwarding addresses did not contain any address from Stephen Hathaway (A. 512-514). The only connection with Box 121 and Stephen Hathaway was testimony that four or five years before a postal clerk remembered forwarding some mail to South Road in Deerfield, New Hampshire (A. 514-541). The postmaster of Deerfield recalled receiving some mail for Hathaway between the years 1968-1971 and forwarding some mail to Biddeford, Maine. The postmaster at Biddeford, Maine had no way of telling whether or not Stephen Hathaway had ever received mail there, as they kept no records, although Hathaway was listed as a patron of an RFD Route.

At the conclusion of the government's case, the defendants filed motions for acquittal (A. 850, 851). The Court reserved hearing and decision on the motions for acquittal.

On July 22, 1975, defendants' motion to require election by the United States or in lieu thereof for judgment of acquittal was heard and the motion was denied. Requests for instructions were submitted and heard and various objections were taken by the defendants (A. 841-849).

On July 23, 1975, the jury received the court's instructions. The jury returned a verdict of guilty on each

count as to each defendant. The defendants renewed their motions for judgment of acquittal.

The defendants seasonably filed motions for new trial (A. 852-855). On July 29, 1975, a hearing was held on the reserved motions for judgment of acquittal and on the motions for new trial. Judge Murray denied the motions for acquittal on July 31, 1975 (A. 850, 851).

On August 26, 1975, the motions for new trial were denied, and certain papers on the issue of authorization for the grant of immunity were impounded (A. 858).

Each defendant filed a separate timely notice of appeal (A. 859, 862, 863), and subsequently filed a joint notice of appeal.

Judge Murray after hearing argument by counsel for the defendants and the government, ordered the impounded papers relevant to the authorization request for immunities released for the sole purpose of review in preparation for this appeal (A. 867). The government and the defendants stipulated to facts relating to that issue (A. 865-867).

Proceedings relating to certain immunity grants.

Prior to trial, the defendants filed motions seeking compliance by the government with the District Court's order of discovery (A. 15a, 15b). Following the government's failure to comply (A. 32, 33), a hearing before Judge Murray on June 16, 1975, resulted in his ordering the compliance as set forth in his notice of June 23, 1975 (A. 34).

In response to the defendant Baptista's motion for divulgence of grants of immunity and similar actions by governmental authorities (A. 18, 19), the order of June 23, 1975, required the government "to disclose the information, including copies of documents to the defendant not

later than June 30, 1975" (A. 34). Despite the order of the court, the government failed to comply fully prior to trial. After the first day of trial, July 8, 1975, the government produced so-called FBI 302 reports of investigation. In the prefatory statements as to several of the Meridian interviewees and grand jury witnesses, there was reference to an apparent understanding that such witnesses were not intended to be prosecuted. On July 9, 1975, the government requested the court for the first time to sign orders compelling the testimony of six of these individuals: Timothy McDonald, Carl Sinibaldi, Kenneth Cestari, Caesar Wheeler, Carol Nozka and Monica Seidlecki (A. 7, 8). In the hearing on this request, the government for the first time produced a letter granting informal immunity to several of those witnesses (A. 2-32, 2-33).

The objections raised by the defendants at trial (A. 170-175) and subsequently in the motion for new trial (A. 852-855) resulted in the impoundment by Judge Murray of one letter related to that issue (A. 858). On September 29, 1975, following a post-trial hearing before Judge Murray, modification of the impoundment order was allowed (A. 864). Stipulations between the government and the defendants were agreed upon subsequent to that order (A. 865-867).

Reason for Granting the Writ.

The reasons for this Court's granting the writ of certiorari will be separately advanced under each of the issues addressed below.

I. Did the Trial Judge Err in Instructing the Jury that Travel or Use of the Mails by a Non-Defendant Putative Victim was Sufficient Basis for Finding a Violation by the Petitioner of the Travel Act, 18 U.S.C. § 1952?

The Court of Appeals for the First Circuit decided issues in this case in direct contravention of the holding in *Rewis* v. *United States,* 401 U.S. 808 (1971), and the principles announced therein. The petitioner was convicted for violations of the Travel Act, 18 U.S.C. § 1952 where there was neither allegation in the indictment nor evidence in the record that he engaged in any interstate activity in furtherance of an unlawful purpose. The only evidence of interstate activity was that by the non-defendant putative victim. There was no evidence to show and no finding to establish that the victim was an agent or employee of the petitioner. Accordingly, the facts of this case raise directly the scope of the holding of this Court in *Rewis* v. *United States, supra,* where it was held that use of interstate facilities by non-defendant victims of an unlawful activity was not caused by the defendant. Should this Court find that its holding in *Rewis, supra,* does not dispose of this case, it is still appropriate for review. *Rewis* expressly reserved for a case properly presenting it, the question of the extent of encouragement required for finding that a defendant's conduct approximated the conduct of a principal in a criminal agency relationship sufficient to warrant application of the Travel Act. The petitioner's is such a case.

An indispensable element of a prima facie case under the Travel Act, 18 U.S.C. § 1952, is interstate travel or use of an interstate facility in furtherance of unlawful activity. The government conceded that it could not

show that the petitioner traveled or used any facility in interstate or foreign commerce. Instead, the government sought to ascribe to the petitioner the travel of Thomas Graham, a non-defendant putative victim, to New Bedford and his mailing of checks to the defendant Hathaway in an attempt to supply the missing requisite interstate element of the offense. Although the Court of Appeals rejected the government's contentions regarding Graham's travel to New Bedford as unsupported by sufficient evidence of inducement, it affirmed the petitioner's Travel Act conviction under 18 U.S.C. §§ 1952 and 2 by finding that the trial court's instructions to the jury comported with the standard announced in *United States* v. *Rewis, supra.* The petitioner disagrees.

Rewis reversed a conviction under the Travel Act where, as here, the only interstate activity was that of the victim; where as here, the petitioner could have reasonably foreseen interstate travel by victims; and where as here, the victim was neither an employee nor an agent of the petitioner. In so doing, this Court stated that the legislative history of § 1952 strongly suggested that the Travel Act should not apply to criminal activity in such situations out of comity for the states.

The government argued in *Rewis* that where the owner of an illegal operation could foresee that customers would cross state lines, the interstate element of § 1952 was fulfilled. This Court rejected such an interpretation noting that there was little, if any, evidence that Congress intended foreseeability to govern criminal liability under § 1952. Regardless of this pronouncement, the Court of Appeals placed great reliance on foreseeability in finding the minimal activity of the petitioner in giving a few blank invoices of a company with a Massachusetts address to Graham in Massachusetts as sufficient evidence of causation or inducement to satisfy 18 U.S.C. §§ 1952 and 2. The Court of Appeals states that Baptista, "knew that Meridian was a Pennsylvania-based company and that the address of the invoices was in Massachusetts" (App. 20). This is the sole finding of the Court of Appeals regarding a showing to support its contention that the petitioner caused or induced the mailings. It is this reliance on foreseeability, denounced by this Court as an overly expansive construction of § 1952 as well as unintended by Congress to govern criminal liability under § 1952, upon which the Court of Appeals rests its decision. The effect of such a finding by the Court of Appeals is a total erasure of state lines.

Thus far this Court has recognized only one instance in which the interstate activities of one person can permissibly be attributed to another, the instance where an employer-employee or agency relationship is found to exist. *United States* v. *Chambers,* 382 F. 2d 910 (6th Cir. (1967). *United States* v. *Barrow,* 363 F. 2d 62 (3d Cir. 1966). *United States* v. *Zizzo,* 338 F. 2d 577 (7th Cir. 1964). The case at bar does not present such a situation as Graham was not found to be an employee or an agent of Baptista's. In fact, the government stipulated that the only conspiracy that could be found in the case was between Hathaway and Baptista. Had Graham been an agent or employee of Baptista, on the evidence presented, he surely would have been found to have conspired with the petitioner. A stipulation that there could be no conspiracy between Graham and Baptista is evidence that there was no agreement between them. Since this case lacks such an employee or agency relationship, the Court of Appeals and the trial court have expanded the reach of the Travel Act to proportions beyond those authorized by this Court, or indeed, by Congress.

To the extent circumstances such as these have been considered by Courts of Appeals, see e.g. *United States* v. *De Cavalcante*, 440 F. 2d 1264 (3d Cir. 1971), and *United States* v. *Marquez*, 449 F. 2d 89 (2d Cir. 1971), the facts do not even remotely approach those in petitioner's case. These are the only cases wherein the interstate activity of a victim was imputed to a person charged under the Travel Act who did not himself engage in interstate activity.

Marquez involved a victim who was an employee of the defendant. The facts of *Marquez*, therefore, place it squarely within the agent or employee exception to the general rule recognized by this Court in *Rewis*, that the defendant must have engaged in interstate activity.

In *De Cavalcante* the victims of an extortion scheme were forced to travel interstate to pay money to individuals who had previously robbed them at gunpoint. The interstate travel of the victims was attributed to the extorters under 18 U.S.C. § 2(b) which requires one *willfully* to cause an act to be done. The Court stated that "use of the word 'causes' in the statute (18 U.S.C. § 2(b)) conveys an intent sufficiently broad to encompass not only voluntary acts of true agents, but also the involuntary acts of victims. The jury in the case at bar was not required to find nor was asked to find that the payments made by Graham were made involuntarily. The jury had to find only that Baptista caused or induced Graham to use the mails. The only evidence the jury had before them upon which they could find Baptista caused or induced Graham to use the mails was evidence that Baptista gave Graham blank invoices of a Massachusetts company. As the jury merely had to find that the petitioner caused or induced Graham to use the mails while § 2(b) requires a finding of willfully causing, the jury was allowed to convict on a less stringent standard than that required in § 2(b).

Both *Marquez* and *De Cavalcante* involved situations wherein a victim was threatened with death or bodily harm by the defendant unless that victim did something ordered by the defendant. To understate the issue, such a situation most certainly "causes" a person to do something. To cite such cases as authority for the contention that the petitioner's giving blank invoices to Graham "caused" Graham to mail something is unreasonable and inappropriate.

In addition, the facts of this case regarding Graham must be continuously borne in mind. Graham testified as set out *supra* that he had bribed four individuals in an amount exceeding $100,000 in return for contracts. Thus Graham was no stranger to making payments such as those he made to Baptista. To say that the petitioner caused or induced an individual with a history such as Graham's to use the mails to make such payments sufficient for the petitioner to have violated § 1952 defies the facts of this case.

This Court in *Rewis* conclusively rejected an expansive interpretation of the Travel Act as a broad interpretation would alter sensitive federal-state relationships. Additionally, as noted by other courts, the legislative history of the Travel Act reveals that Congress passed the act in an attempt to aid state officials where criminal activity was carried on in one state by individuals residing and acting in another. The conviction of the petitioner, in the instant situation, offends traditional notions of comity of the states as here Massachusetts has not chosen to prosecute the petitioner when it clearly could do so. This is particularly true where as in this case the federal nexus is so remote that the government must strain to find the required interstate element. There is no question in this case of Massachusetts not being able to reach the activity of the petitioner. Thus, there is no necessity for federal intrusion with respect to the petitioner.

It is ironic that the Travel Act is here used to prosecute defendants whose sole activity was intrastate through the use of a putative victim who and who alone was the interstate traveler. Such an application of the Travel Act turns federal-state relationships on their heads and if fostered by this Court, will lead inevitably to an over-reliance by state prosecutors on the federal presence. The administration of the criminal law — both state and federal — will be better served by a clear pronouncement from this Court that local crimes should be prosecuted primarily locally.

II. Did the Trial Court Commit Error and Thereby Violate the Due Process Rights of the Petitioner in Charging the Jury that the Petitioner could be Convicted under the Travel Act upon a Finding of Mere Receipt by the Petitioner of Payments Voluntarily Made by the Putative Victim Graham, thus Allowing the Government to Proceed on Inconsistent Theories?

The government initially proceeded on a theory of extortion under the Hobbs Act, 18 U.S.C. § 1951. However, the Court's instructions to the jury under the Travel Act, 18 U.S.C. § 1952 allowed conviction on mere proof of receipt by Baptista of payments *voluntarily* made by Graham. In giving such instructions, the jury was allowed to convict under the Travel Act for mere bribery and was not required to find extortion. As a result, the government was allowed to try its case on the six counts of the indictment using inconsistent proofs. The petitioner seasonably moved to require election by the government. The trial court, however, denied this motion.

Traditionally the essence of extortion is duress while that of bribery is voluntariness on the part of the person offering the bribe. *United States* v. *Addonizio,* 451 F.2d 49

(3d Cir. 1972). While the jury was required to find that Baptista induced or coerced Graham to make the payments under the Hobbs Act, the jury was allowed to find these same payments were voluntarily made by Graham under the Travel Act. It is in this sense that the government's proofs are inconsistent. Regardless of the labels of bribery and extortion, the heart of the petitioner's claim is that a singular transaction has been inconsistently characterized both as voluntary and as coerced or induced.

The Court of Appeals stated in its opinion that bribery and extortion are not mutually exclusive, citing *United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974), and *United States* v. *Kahn,* 472 F.2d 272 (2d Cir. 1973), in support of this contention. However, *Kahn* and *Braasch* present factual situations differing significantly from that of the instant case in which one individual, Baptista, was found guilty of both bribery *and* extortion for a singular transaction.

In *Braasch,* the petitioner claimed that his conduct was that of bribery and not extortion, and therefore, he could not be convicted under the Hobbs Act, 18 U.S.C. § 1951, as it required proof of extortion. The court responded by saying that for purposes of the Hobbs Act, that which might constitute "classic bribery" could also be extortion. The court nowhere intimated that the same individual could, for the same act, be convicted of both bribery and extortion. Moreover, the court in *Kahn* said that if one individual could be found to have voluntarily made payments to a person charged with a violation of the Hobbs Act, that such voluntariness could be evidence of lack of intent to commit extortion by the person charged under the Hobbs Act. *Kahn* addressed the issue of whether bribery was a complete defense to a charge of extortion. Again the guilt of two individuals was involved.

The petitioner is not complaining that the transaction should be classified as bribery or blackmail and not extortion, as in *United States* v. *Nardello,* 393 U.S. 286 (1969) (appeal from U.S. District Court, E.D. Pa.), but rather that the same payment cannot be found both to have been induced or coerced by the petitioner to obtain a conviction under the Hobbs Act and then transformed into a voluntary payment so that the government could obtain a conviction of the petitioner under the Travel Act on a theory of bribery.

As the trial court did not require election by the government, the Fifth Amendment due process rights of the petitioner were violated.

III. Were the Petitioner's Fifth Amendment Due Process Rights Abridged by (1) the Government's Failure to Comply with the District Court's Order; and (2) the Admission of Evidence Through Four Witnesses Immunized in Violation of 18 U.S.C. § 6003?

The trial judge erred in admitting evidence from four witnesses who were granted immunity in violation of 18 U.S.C. § 6003 (App. 34). The petitioner believes that his Fifth Amendment due process of law rights were abrogated by these violations of 18 U.S.C. § 6003.

Given the unusual circumstances underlying the authorization and requests for immunity by the government on the second day of trial, the petitioner seasonably objected to the issuance of immunity orders, and renewed this objection in the motion for new trial (A. 852-855).

The issue of whether or not the summary manner in which these grants of immunity were obtained comports with due process is an appropriate question which the petitioner has standing to raise.

The trial judge issued discovery orders (A. 15a, 34) requiring *inter alia* the government to disclose any information or documents wherein grants of immunity or similar promises or benefits to prospective witnesses were contained. The government clearly violated these orders by withholding material covered by them.

The clear violation of the discovery order became apparent for the first time (A. 161-162) on the second day of trial when the government produced a letter to Leonard Bucki, Esquire, counsel to the four Meridian employees, whose grants of immunity are the subject of this violation. The letter plainly promised that no prosecutions would result from any testimony given at trial (A. 161-162). Clearly such promises of non-prosecution were purposefully withheld from the defense, in direct contravention of the District Court's discovery orders.

On July 9, 1975, the second day of trial, the government requested a recess for the purpose of seeking authorization from the Department of Justice in Washington to request orders of immunity for Carl Sinibaldi, Timothy McDonald, Caesar Wheeler, Kenneth Cestari, Carol Nozka, and Monica Seidlecki.

Less than two hours later, the government produced authorization for grants of immunity from Assistant Attorney General Richard L. Thornburgh. Thornburgh had been sworn into that position on the previous day. The petitioner objected to the summary manner in which this authorization was both requested and received (A. 169, 174). The trial judge then ordered Assistant United States Attorney Brooks to produce the request document signed by United States Attorney Gabriel, as required by 18 U.S.C. § 6003.[5]

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[5] The letter from U.S. Attorney Gabriel to Assistant Attorney General Thornburgh was impounded by order of Judge Murray. Defense counsel was allowed to review this letter after a special hearing was held before Judge Murray (A. 864). The letter is not reproduced in the Appendix, per order of Judge Murray, but has been transmitted to the Court under seal.

The government has admitted that contrary to the statements in the July 8, 1975 letter, the official forms USA-167 for requests of immunity were never forwarded to the Department of Justice (A. 865).

The petitioner believes that Assistant Attorney General Thornburgh was not apprised of the facts and circumstances necessary for the exercise of informed judgment required by 18 U.S.C. § 6003. Considering the unusual haste of the government, the absence of the information usually included in Form USA-167, and the probable non-familiarity with his recently acquired position, there is substantial doubt that his approval was obtained in compliance with the requirements and intent of 18 U.S.C. § 6003.

The statute purposely interposes the approval of the attorney general or the specially designated senior official between the United States attorney and the District Court prior to the grants of immunity. It is the overall perspective of the official in a centralized role in the Justice Department which provides assurance of meaningful consideration.

Richard L. Thornburgh assumed his position no more than 24 hours before making these decisions. His determination could not have been made with the appropriate overall perspective when made in haste by a person in that role for the first day.

The legislative history of both 18 U.S.C. § 6003 and its predecessor 18 U.S.C. § 2514 (App. 35) indicate a particular concern that immunity grants be issued by the courts only upon evidence of the exercise of informed judgment by both the U.S. attorney and the senior official in Washington. During Senate hearings, Congressman Richard Poff, member of the National Commission on Reform of Federal Criminal Laws, testified as follows:

> "Is the public need for the particular testimony or documentary information in question so great as to override the social cost of granting immunity and thereby possibly pardoning a person who has violated the criminal law? Such a calculation can be made only by a person familiar with the total range of law enforcement policies which would be affected by an immunity grant, and not by one familiar only with the asserted public need in the particular case."[6]

The concern for the exercise of informed judgment by the responsible Department of Justice official is similar to the rationale of the Supreme Court's decision in *United States* v. *Giordano,* 416 U.S. 505 (1974).

In *Giordano,* the Court held that the pre-application approval for wiretaps could only be given by the officials designated in the statute. Because Congress specfically designated particular officials, the Court held that the "mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *United States* v. *Giordano,* 416 U.S. at 515-516.

The precise reasoning applied by the Court to 18 U.S.C. § 2516 must be accorded the immunity statute, § 2514, incorporated into the wiretap section with § 2516. In 1970, 18 U.S.C. § 6003 was passed to replace § 2514, but only to change the nature of the statute from transactional to use immunity. Nowhere in the legislative history does the Congress modify the requirement of informed judgment

[6] Senate hearings on S. 30, "Measures Relating to Organized Crime." Hearings before Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 91st Congress, first session, March 18, 19, 25, 26; June 3, 4, 1969, p. 287-312. See also Senate Report no. 91-617, December 18, 1969, and House Report 91-1188, June 15, 1970 for further legislative history.

by a senior Department of Justice official. Clearly, 18 U.S.C. § 6003 adopts that precondition to the fullest extent.

In light of the practices revealed in *Giordano,* wherein non-designated officials routinely perform these discretionary tasks, and in view of the probable lack of familiarity with his new position, the hasty approval of the grants of immunity without the necessary information does not meet the requirements of 18 U.S.C. § 6003.

The petitioner has undisputable standing to *raise this issue.* He and he alone is likely to be concerned with the loose immunizing of witnesses. A person who benefits from such practice by gaining immunity is unlikely ever to complain. The offending United States officials granting the immunity are estopped from raising the issue. Only the victim of such immunity grants has the interest requisite to call to a court's attention events such as are exposed in the present case. Such circumstances surely constitute "standing," unless violations and mockeries of law are to be unchallenged. Further, under the facts of this case, clear orders of a District Court relating to the divulgence of immunity information were violated. The petitioner has standing to seek the imposition of sanctions for those violations.

Without the appearance of the witnesses improperly immunized in this case, crucial evidence both testimonial and documentary essential to the government's case would be lacking. *See,* e.g., Ex. 4-21 (A. 793-809). The government should not be allowed the fruits of its violations of court orders and Congressional mandates. The conviction of the petitioner under all counts is thus tainted by the immunity grants and as such is in violation of the petitioner's due process rights.

Conclusion.

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 22 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1528

HOWARD BAPTISTA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Appendix to the Petition for a Writ of Certiorari.

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United States Court of Appeals for the First Circuit.

No. 75-1352

UNITED STATES OF AMERICA,
Appellee,

v.

STEPHEN HATHAWAY,
Defendant, Appellant.

No. 75-1353

UNITED STATES OF AMERICA,
Appellee,

v.

HOWARD BAPTISTA,
Defendant, Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank J. Murray, U.S. District Judge]

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

C. Thomas Zinni and *Morris M. Goldings*, with whom *Corinne Gehr* and *Alan Rindler* were on brief, for appellants.

Steven J. Brooks, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, *Edward J. Lee*, *Kevin J. O'Dea* and *Alan D. Rose*, Assistant United States Attorneys, were on brief, for appellee.

March 24, 1976

CAMPBELL, *Circuit Judge.* Defendants Hathaway and Baptista were charged in a six-count indictment with substantive and conspiracy violations of 18 U.S.C. § 1951, the Hobbs Act, and 18 U.S.C. § 1952, the Travel Act. Both were convicted of all charges after an eight-day jury trial.

The Government contended that defendants extorted money from Meridian Engineering, Inc. (Meridian), in return for the award of two contracts by the New Bedford, Massachusetts, Redevelopment Authority (Authority), of which Baptista was Executive Director. Meridian was a design, engineering, and construction management firm with its principal office in Philadelphia, Pennsylvania. In the summer of 1971, the Authority awarded Meridian a no-bid contract for the West End Urban Redevelopment Project (WEP), and in the summer of 1972 it awarded Meridian a contract for the Neighborhood Development Project (NDP). Both of those contracts were allegedly arranged at meetings between Baptista and Thomas A. Graham, the President of Meridian.

Graham, testifying under a grant of immunity, 18 U.S.C. § 6003, was the Government's chief witness. He testified that Meridian first came in contact with the Authority in early 1971, when Meridian worked on WEP as a subcontractor for the project consultant, Lucas & Edwards, Inc., a New York planning firm. Meridian became interested in doing its own engineering and design work for the Authority as a "follow-on" to the planning services performed by Lucas & Edwards, Inc. Graham therefore met with William Lucas of Lucas & Edwards, Inc., to discuss a WEP contract for Meridian. From Lucas, Graham gained the impression that to procure a WEP contract for Meridian, he would have to pay a sum of money to Baptista, whom he had never met. A meeting of Graham, Lucas and Baptista was arranged, and Graham and Lucas flew to New Bedford.

At the meeting, the topics of discussion were the WEP contract and the payment of money by Meridian to Baptista for that contract. Graham testified that he proposed the sum of $25,000, slightly in excess of 10% of the contract amount, and that Baptista agreed to it. Prior to the meeting, Graham had drawn up a schedule for the payments, which would number four, laying out four payment dates, the amounts to be paid to Baptista on each date, and a Meridian project to which the amounts would be charged. Baptista gave Graham four blank invoices, bearing Hathaway's letterhead, for the purpose of charging and covering up these payments.

During the meeting, Baptista mentioned another Authority project, the NDP. He told Graham that the contract would be coming up in the following year and that he was interested in Meridian doing a good job on WEP so that it could be considered for the later project.

Graham testified that he agreed to make the payments because otherwise Meridian would not have received the WEP contract.

After returning to Philadelphia, Graham caused the blank Hathaway invoices [1] to be filled in with Meridian's address, a statement of work "performed", i.e. labor, materials, or equipment that Hathaway allegedly furnished, and the amount due. The amounts were charged against other Meridian jobs. The project managers for each of those jobs testified that no Stephen Hathaway supplied any materials or did any work on those jobs. The invoices and the schedule which Graham had drawn up were given to Meridian's comptroller, who placed them in a cash flow file with instructions to mail the checks on the dates noted and to file

[1] The original invoices were not offered at trial as they could not be located in Meridian's files.

the entries against the invoices. In all, four checks were made out to Stephen Hathaway pursuant to the invoices and were signed by Carl Sinibaldi, the head of Meridian's accounting department and Graham's brother-in-law. The company practice was to enclose copies of invoices with all checks. It was testified that the checks were then sent to 59 Raymond Street in Manchester, Massachusetts, the address on the invoices, although Margaret R. Hathaway, who resided at that address during 1971 and 1972, herself testified that Stephen Hathaway had left that residence permanently in 1964, and that no mail had come for him there since 1970.

Graham testified that he saw Baptista again in July, 1971, at Baptista's office, and asked if the first check had been recevied and if the procedure being used was satisfactory. Baptista stated that it was and that he had received the first payment.

Work was begun on the project even before the contract was actually signed. Graham testified that although it was very rare to begin so early, Meridian went ahead as he had received a letter of assurance from Baptista that Meridian would be awarded the contract at the next board meeting. The Authority did in fact award the contract to Meridian at that board meeting in August, 1971.

The following summer, in early August, 1972, Graham again met with Baptista at his Authority office in New Bedford to discuss the NDP contract. This meeting was arranged by either Graham or one of his staff, not by Baptista. Graham testified that before leaving Philadelphia he prepared a schedule similar to the one used in 1971.[2]

[2] Graham testified about this schedule on five separate occasions. Three times he said that he prepared it prior to his trip, and twice, upon the suggestion of an Internal Revenue Service agent, that he could not have prepared it before.

At the meeting, according to Graham's testimony, he told Baptista that he had learned from Caesar Wheeler, Meridian's WEP project manager, that Meridian was not going to receive the NDP contract. Baptista replied that he was under local pressure to award the contract to a local firm. Graham suggested that they work out an arrangement as before and offered $5,000, using the same procedure. Baptista replied that he thought he could swing the contract for Meridian, and that $5,000 would be satisfactory. Graham asked for another set of blank invoices, and Baptista gave him some more with Hathaway's letterhead. Graham showed Baptista the schedule he had prepared, listing four payments totalling $5,000 and the projects to which the amounts would be charged. Graham testified that he again agreed to pay the money since he believed that Meridian would not receive the contract otherwise. The Authority approved Meridian for the NDP engineering work in September, 1972.

As before, these invoices were filled out and given to Meridian's accounting department to pay. Again, the managers of the projects to which the charges were billed testified that Stephen Hathaway was in no way involved. Checks were made payable to Stephen Hathaway and sent to the address on the invoices, Box 121, West Roxbury Post Office, West Roxbury, Massachusetts. The first check was sent to that address but was lost.[3] A replacement check and the remaining three checks were sent to the old Manchester address.

The records of the West Roxbury post office gave no indication of Box 121 ever having been assigned to Stephen Hathaway since 1969; nor was there any notation that any mail had been forwarded to Stephen Hathaway since 1969.

[3] No explanation was offered at trial as to how Meridian learned the check had been lost.

However, the postal clerk in charge of box mail at that post office between 1970 and 1974 testified that he was personally familiar with the name Stephen Hathaway, although not the person, and recollected that Hathaway had been box-holder of Box 121. He also recalled having forwarded Hathaway's mail to South Road in Deerfield, New Hampshire, although the last time had been four or five years earlier. The postmaster of Deerfield testified that she knew Hathaway, that he had received mail there within the past six years, and that she had forwarded his mail to Biddeford, Maine, where Hathaway was listed as a postal patron.

However uncertain the chain of mail delivery, it was clearly established that all eight Meridian checks bore a single endorsement, the name Stephen Hathaway, and that all were cashed at the Southeastern Bank in New Bedford. Hathaway had no account at that bank but he was known to the bank employees since he often cashed checks there, probably more than forty since 1969. The bank allowed non-depositors to transact business there if they were first introduced by someone known to the bank. It was brought out that Hathaway had originally been introduced to Robert LeVesque, Senior Vice-President and Controller of the bank, by Baptista, a director and officer. LeVesque testified that Hathaway's normal routine when cashing checks there was to have Jackie McDonald, Baptista's secretary, first call ahead and tell the bank that he was coming over and to have the amount of the check ready for him. Hathaway cashed checks there ranging anywhere from $200 or $300 to $19,000 or $20,000. Ms. McDonald testified that she did not do this only for Hathaway, but that she communicated with the bank quite often on behalf of various contractors and tenants of the Authority who were also non-depositors there.

Francine Tavares, the head teller, testified that she had personally cashed two of the Meridian checks, identifying

her stamp on them. She also identified Hathaway in the courtroom. She recalled on one occasion seeing Hathaway speaking with Baptista in the bank lobby, and she saw Baptista there a number of times.

Hathaway in fact never performed any work for the Authority. There was no evidence of personal contact between Graham and Hathaway, and Graham testified he was not even certain that Hathaway existed until the investigation of the case was under way.

I

Defendants first raise a number of objections to their Hobbs Act convictions. The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —
>
> . . . . .
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term 'commerce' means . . . all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Defendants were charged under this section with willfully attempting to obstruct, delay and affect interstate commerce and the movement of materials, equipment, services and supplies in such commerce by extortion, induced both by the wrongful use of fear of economic loss and under the color of official right.[4] Their present challenges have to do with the meaning of "extortion", the meaning of "commerce", and the sufficiency of the evidence on various elements of the Government's case.

Defendants contend that the district court incorrectly instructed the jury as to the meaning of extortion under the Hobbs Act,[5] quoting as follows from the court's charge:

[4] Count III reads in pertinent part,

> "From on or about June, 1971 to on or about November, 1971 . . . [defendants] did knowingly, willfully and unlawfully attempt to obstruct, delay and affect interstate commerce and the movement of materials, equipment, services and supplies in such commerce by extortion, in that the defendants . . . obtained a sum of money in the amount of approximately Twenty-five Thousand Dollars ($25,000) from Thomas A. Graham and Meridian Engineering, Inc., induced both by the wrongful use of fear and under the color of official right, in that the defendants, acting in concert, . . . did demand, solicit and obtain from Thomas A. Graham and Meridian Engineering, Inc. money in the amount of approximately Twenty-five Thousand Dollars ($25,000), which said sum of money was paid to prevent economic loss due to the fact that Thomas A. Graham and Meridian Engineering, Inc. could not obtain, without paying said sum of money, engineering and planning contracts with the said New Bedford Redevelopment Authority."

The other Hobbs Act count, Count V, relating to the alleged extortion of $5,000 for a contract in 1972 was similarly worded.

[5] In construing the Hobbs Act, we have in mind the Supreme Court's admonition that Congress, in enacting the statute, intended to "use all the constitutional power [it] has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U.S. 212, 215 (1960).

> "The term 'extortion' means obtaining of property from another with his consent induced under color of official right. It is an alternative method. It is the second string to the government's bow. The term extortion under the statute includes the obtaining from another induced under color of official right. The government is entitled to prove the element of extortion in the crimes charged in Counts 3 and 5 [Hobbs Act violations] either by proving extortion of money induced by fear of economic loss, or extortion of money induced under color of official right. The government is not required to prove both by fear and under the color of official right."

Defendants argue that actual or threatened force, violence or fear are necessary elements of extortion in all Hobbs Act cases, even those involving the obtaining of property under color of official right. They rely upon what they say is the traditional distinction between bribery and extortion, bribery involving voluntary payment by the victim, and extortion payment under duress. *United States* v. *Addonizio,* 451 F.2d 49, 72 (3d Cir.), *cert. denied,* 405 U.S. 936 (1972).

However, we find no reason to part company with the other circuits which have considered this question, all of which have read the statute as did the court below. *United States* v. *Trotta,* 525 F.2d 1096, 1100 (2d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3505 (U.S. Jan. 21, 1976) (No. 75-1032); *United States* v. *Braasch,* 505 F.2d 139, 151 & n.8 (7th Cir. 1974) (Clark, J.), *cert. denied,* 421 U.S. 910 (1975); *United States* v. *Kenny,* 462 F.2d 1205 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972); *cf. United States* v. *Price,* 507 F.2d 1349 (4th Cir. 1974). The statute is clearly phrased in the disjunctive: "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or

fear, *or* under color of official right." § 1951(b)(2) [Emphasis supplied]. Further, a disjunctive reading comports with the historical development of the crime of extortion. The "under color of official right" language reflects the common law definition of extortion, which could be committed only by a public official's corrupt taking of a fee under color of his office and did not require proof of threat, fear, or duress. *United States* v. *Staszcuk,* 517 F.2d 53 (7th Cir. 1974) (en banc) (Stevens, J.) (adopting by reference the panel opinion at 502 F.2d 875,878 on this point), *cert. denied,* 44 U.S.L.W. 3202 (U.S. Oct. 6, 1975); *United States* v. *Crowley,* 504 F.2d 992, 994-95 & n.5 (7th Cir. 1974); *United States* v. *Kenny, supra,* 462 F.2d 1229, *citing United States* v. *Nardello,* 393 U.S. 286, 289 (1969); W. LaFave & A. Scott, Criminal Law, § 95 at 704 (1972). The misuse of public office is said to supply the element of coercion. *United States* v. *Mazzei,* 521 F.2d 639, 644-45 (3d Cir. 1973) (en banc), *cert. denied,* 44 U.S.L.W. 3344 (U.S. Dec. 8, 1975). Threats, fear and duress became express elements only when the crime was later broadened to include actions by private individuals who had no official power to wield over their victims. *United States* v. *Crowley, supra; United States* v. *Kenny, supra.* We thus find no error in the instruction given, permitting conviction upon a finding either that money was obtained under color of official right or else that its payment was induced by fear of economic loss, both theories having been charged in the indictment.

Respecting the "official right" theory, defendants assert that the charge erroneously allowed the mere passive receipt of money to establish a violation. This, they contend, would be bribery, not extortion. We agreed, however, with recent federal decisions indicating that bribery and extortion as used in the Hobbs Act are not mutually exclusive. *United States* v. *Braasch, supra,* 505 F.2d at 151 & n.7; *United States* v. *Kahn,* 472 F.2d 272, 278 (2d Cir.), *cert. denied,*

411 U.S. 982 (1973). Here, moreover, the court charged that the inducement had to come from the official:

> "[W]here the initiative and the inducement for the payment comes from or is on the part of the public official, and not the voluntary payment on the part of the so-called victim, it is this wrongful use of the office clothed with power of authority that converts official action into extortion."

This instruction clearly precluded conviction based upon the passive receipt of money. Indeed, to the extent it suggested that the initiative had to come *solely* from the official, it may have been even more favorable to the defense than was strictly necessary.

Defendants further complain that the court erroneously charged that "as a matter of law" Baptista was a public official for purposes of § 1951. They would have us infer this from the court's refusal of their request for an instruction requiring proof that Baptista had the "direct administrative or operating authority to approve, disapprove or otherwise direct the action of the New Bedford Redevelopment Authority as to whether it would award each contract to Meridian." The court instead charged that if Baptista "used the office of Executive Director of New Bedford Redevelopment Authority to initiate and induce payments", the inducement to part with money was extortion.

We find no error. "Under color of official right" includes the misuse of office to induce payments not due. The relevant question was whether Baptista imparted and exploited a reasonable belief that he had effective influence over the award of Authority contracts. *United States* v. *Meyers,* No. 75-1743, slip op. 8-9 (7th Cir. Feb. 12, 1976); *United States* v. *Mazzei, supra,* 521 F.2d at 643; *see United States*

v. *Staszcuk, supra,* 502 F.2d at 878. There was considerable evidence that as Executive Director Baptista was, and appeared, able to influence the awarding of contracts. To be sure, as defendants point out, Baptista's statutory power was subordinate to that of the Authority's board, M.G.L. c. 121B, and various members testified that the board had not always in the past ratified Baptista's recommendations. Still, Graham testified that he went to Baptista because Lucas led him to believe that to obtain a contract he would have to pay Baptista. Baptista thereafter agreed, for a consideration, to furnish a contract, and Meridian in fact received a contract. These and subsequent events bore witness to Baptista's power. Moreover, in the summer of 1971, Baptista was able to give Graham advance assurance that the board would approve Meridian at its next meeting. And in 1972, Baptista told Graham that he was under local pressure to award the NDP contract to a local firm, implying that the award was his own decision. Thereafter he redirected the contract to Meridian. The evidence was thus more than adequate that Baptista could influence awards, and that he exploited this ability.

Besides challenging the "official right" aspect of the extortion charged, defendants assert error with respect to the alternative theory set forth in the indictment; namely, extortion by fear of economic loss. As well as "under color of official right", the Hobbs Act encompasses extortion through actual or threatened violence, threats, or fear, 18 U.S.C. § 1951(b)(2). *See United States* v. *Addonizio, supra.* "Fear" includes fear of economic loss. *Id.* at 72; *Bianchi* v. *United States,* 219 F.2d 182, 189 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955). The indictment charges defendants with soliciting money, and Graham and Meridian with paying it in order "to prevent economic loss", described as an inability to obtain contracts with the Authority. Defendants contend that Graham was as a matter of law incapable

of being extorted through fear of economic loss, both because he was no stranger to the bribing of officials and because Meridian had no prior entitlement to the two no-bid contracts and thus no "economic loss" to fear.

Graham undoubtedly had a striking and, one might say, colorful history of paying off officials. He testified to bribing the majority leader of the Pennsylvania House, the treasurer of the State of New Jersey, and the mayor of Lancaster, Pennsylvania. These payments were entered on Meridian's books as administrative travel expenses. He also admitted to giving the chairman of the Republican Party of Bucks County, Pennsylvania, an interest-free loan which was partly forgiven, and to employing an attorney who performed little by way of legal services, but apparently was adept at insuring the continuation of state jobs in New Jersey. In August, 1972, on the day before his meeting with Baptista, Graham met with one Jerry Sands in New York, whom Graham used on two or three occasions as a "money laundry" to take money from Meridian for his own personal use, by authorizing payment on fake invoices. On all this evidence, defendants urge, Graham was unextortable as a matter of law.

However, as we have said, bribery and extortion are not mutually exclusive. The court cautioned the jury that voluntary payments by Graham would not amount to extortion; and viewing the evidence in a light most favorable to the Government, there is sufficient evidence for the jury to have found that Graham paid Baptista involuntarily in the sense that he otherwise feared Meridian's preclusion from business with the Authority. Graham's overtures to Baptista followed upon Lucas' advice that to procure a contract he would have to pay Baptista. Since Lucas & Edwards, Inc., was already performing work for the

Authority (and since, indeed, Lucas even accompanied him to the first meeting with Baptista), Graham had every reason to accept that Baptista was dealing in this manner. It was Graham's testimony that he agreed to the 1971 payments because otherwise Meridian would not have received the WEP contract. The extortionate aspect is even clearer with respect to the second contract. Baptista dangled the NDP contract before Graham at their first meeting in 1971. Thereafter he told Graham that he was under pressure to engage a local firm. Graham responded by agreeing to pay, and Baptista then arranged the matter in Meridian's favor. The jury could believe that Baptista manipulated the situation to play upon Graham's fears of missing out on the contract. To be sure, on both occasions, Graham himself may have first brought up the subject of payments. But the jury could find that the impetus came from a reasonable apprehension that, without paying, Meridian would not be considered by the Authority. Baptista's exploitation of such a fear amounted to extortion notwithstanding Graham's readiness and even eagerness to play the game. *See United States* v. *Kahn, supra,* 472 F.2d at 277-78.

Defendants also argue that, since Meridian was seeking a no-bid personal service contract, it had no existing property right within the meaning of the Hobbs Act. Graham and Meridian, they say, would not suffer or fear an economic loss if they failed to procure such a contract. However, given the broad purpose of the Hobbs Act, the argument is hypertechnical. The emphasis in extortion is on the coercion by the defendants, *cf. United States* v. *Braasch, supra,* and the resulting fear created in the victim's mind. Clearly some kind of "property rights" would have to be involved, or otherwise there would be no motivation for the victim's acquiescence in the demands of the defendant. But a narrow

perception of property rights or economic loss is misdirected.[6]

Defendants refer to early Hobbs Act cases, where rights or privileges already the victims' were threatened by unwarranted interference,[7] and cases where contractors already engaged in public construction projects have been compelled to make payments to avoid losing their contracts, *United States* v. *Kenny, supra; United States* v. *Addonizio, supra.* But none of those cases expressly rule out the sort of fear alleged here. In *United States* v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970), the court said,

> "The concept of property under the Hobbs Act . . . includes, in a broad sense, any valuable right considered as a source or element of wealth . . . . The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution. [The] right to solicit accounts . . . constituted property within the Hobbs Act definition."

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[6] The Hobbs Act itself refers only to fear, without specific mention of fear of economic loss, although courts have held that the latter is within the kinds of fear contemplated by the Act. *See Bianchi* v. *United States,* 219 F.2d 182, 188-89 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955). The proper focus, therefore, is whether the victim's interest, economic or otherwise, was sufficient to give rise to fear. Collateral inquiry into the kind of economic interest at stake is of little significance except as it may indicate that the victim had no grounds for fear.

[7] Defendants cite only *Bianchi* v. *United States, supra* (payment to avoid unwarranted work stoppage), and *United States* v. *Provenzano,* 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964) (payments to induce truckers to perform tasks already required under their pre-existing contract).

418 F.2d at 1075-76 (citations omitted). Similarly, we think the possibility of lost business opportunities can create a fear of economic loss. *Contra United States* v. *Kubacki,* 237 F. Supp. 638, 640-42 (E.D. Pa. 1965).

We turn next to defendants' claims of error with respect to the Hobbs Act requirement that the extortion affect commerce. The indictment charged attempted obstruction, delay, and effect upon interstate commerce and the movement of materials, equipment, services and supplies therein.

Defendants argue that the judge erred in instructing the jury that only a slight or minimal impact on interstate commerce need be shown and in rejecting their requested instruction that the depletion of Meridian's assets had to adversely affect interstate commerce.[8] However, it has been consistently held that the alleged extortion need only have a *de minimis* effect on interstate commerce. *United States* v. *Shackelford,* 494 F.2d 67, 75 (9th Cir.), *cert. denied,* 417 U.S. 934 (1974); *United States* v. *DeMet,* 486 F.2d 816, 822 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); *United States* v. *Addonizio, supra,* 451 F.2d at 74-77; *United States* v. *Tropiano, supra,* 418 F.2d at 1076-77. The Hobbs Act by its own terms forbids extortion which affects commerce "in any way or degree", 18 U.S.C. § 1951(a), and has accordingly been held to reach even those effects which are "merely potential or subtle". *United States* v. *Augello,* 451 F.2d 1167, 1169-70 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972). *See also United States* v. *Mazzei, supra,* 521 F.2d at 642-43. Indeed, the seventh circuit has gone as far

[8] The judge, in defining the requisite impact on interstate commerce, specifically told the jury that if they believe "that the diminution of Meridian profits adversely affects its ability to engage in interstate commerce, even to a minimal degree, the requisite delay, obstruction, or effect upon interstate commerce has been proved." It is questionable, then, whether defendants even characterize the court's charge properly when they say it does not require a showing of adverse effect.

as to require only a "realistic probability that an extortionate transaction will have some effect on interstate commerce". *United States* v. *Staszcuk, supra,* 517 F.2d at 60. Thus, the instruction was correct.

Defendants contend that there was no evidence of even a minimal affect on commerce. Meridian made twice its average profit on the 1971 contract, and performed its obligations to the Authority. However, there was some evidence that the payoffs adversely affected the sums available to Meridian personnel concerned with the project; and, more basically, paying off Baptista of necessity depleted the funds of the company, an out of state firm operating interstate. The latter impact was enough. *See United States* v. *Mazzei, supra,* 521 F.2d at 642.

Defendants further contend that the admission of evidence on the question of interstate commerce by a Connecticut subcontractor for WEP, Robert D'Angelis, constituted a prejudicial variance or amendment of the indictment. The argument is frivolous. The language to which defendants refer, mentioning engineering services, appears in the introductory paragraphs of the indictment, not the charging paragraphs; and the charging paragraphs are examined when considering whether there has been a variance between pleading and proof. *Cf. Gaither* v. *United States,* 413 F.2d 1061, 1071 (D. C. Cir. 1969). The language of the charging paragraphs fairly covers evidence of the type introduced through D'Angelis.[9] *Cf. United States* v. *Staszcuk, supra,* 517 F.2d at 55 n.3, 56.

[9] *United States* v. *Stirone,* 361 U.S. 212 (1960), on which defendants rely, is entirely inapposite. In that case, the indictment charged interference only with sand shipments, whereas the trial judge's instruction and the proof offered at trial included concrete shipments part of a later stage in the manufacturing process. The Supreme Court held that there was a variance and reversed. Here the indictment was framed in general language and the proof at trial came within that general language.

II

Defendants were convicted not only of Hobbs Act violations but also of violations of 18 U.S.C. § 1952, the so-called Travel Act, all the violations arising from the same transactions. The Travel Act provides:[10]

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. . . ."

The indictment charged defendants with causing others to travel in interstate commerce and to use the facilities of interstate commerce so as to unlawfully solicit, agree to receive, and receive the payment of money in exchange for engineering contracts. 18 U.S.C. §§ 1952 and 2. Their objections go to the elements of travel or use of an interstate facility, and to the nature of the purported "unlawful activity".

[10] In contrast to the broad interpretation given to the Hobbs Act, the Supreme Court has indicated that the Travel Act is to be read in a narrower and more restricted fashion. *Rewis* v. *United States,* 401 U.S. 808, 811-12 (1971).

Defendants argue that the court erred in instructing that Graham's interstate travel and Meridian's use of the mail would sustain a conviction under the Travel Act. The court instructed that if the defendants "caused or induced Graham to travel from Philadelphia to New Bedford" or caused Graham to use the mails, the interstate component of the Travel Act would be satisfied. In *Rewis* v. *United States,* 401 U.S. 808 (1971), the Supreme Court, reversing a conviction under the Travel Act, held that the interstate travel of patrons from Georgia to a Florida gambling operation could not be imputed to defendants, the operation's owners. The Court indicated, however, that a violation could occur if a defendant so actively encouraged patrons to travel interstate that his conduct approximated that of a principal in a criminal agency relationship. *Id.* at 814. We think the instruction here comported sufficiently with the analysis in *Rewis. See United States* v. *Marquez,* 449 F.2d 89 (2d Cir. 1971), *cert. denied,* 405 U.S. 963 (1972); *United States* v. *De Cavalcante,* 440 F.2d 1264 (3d Cir. 1971); 18 U.S.C. § 2(b).

The evidence, it is true, was likely insufficient to support a jury finding that Baptista caused Graham to travel to New Bedford.[11] But evidence of Meridian's prearranged use of the mails to forward checks to defendants strongly supported a jury finding of a requisite interstate activity.

[11] Graham was not in contact with Baptista immediately prior to his visits and there was no showing that Baptista approached him first. However, use of the mails is sufficient in and of itself, for § 1952 is phrased in the disjunctive, and even though the indictment alleges both travel and use of interstate facilities, the conviction can stand if the evidence establishing one of the means alleged is sufficient. *Turner* v. *United States,* 396 U.S. 398, 420 (1970); *United States* v. *Barbato,* 471 F.2d 918, 922 n.3 (1st Cir. 1973).

When Baptista gave Graham the blank invoices for the purpose of making payments, he knew that Meridian was a Pennsylvania-based company and that the addresses on the invoices were in Massachusetts.[12] This use of the mails was more than "incidental", *United States* v. *Isaacs*, 493 F.2d 1124, 1146-49 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), for it was an important link in the interchange between defendants and Meridian. *Cf. United States* v. *Hedge*, 462 F.2d 220, 223-24 (5th Cir. 1972). While the Travel Act is to be construed narrowly, see *Rewis* v. *United States*, this conduct falls squarely within the language of 18 U.S.C. § 1952. *See United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973).

With respect to the element of "unlawful activity", defendants argue that the court erred in allowing the jury to convict upon proof of bribery rather than proof of extortion only. However, the Travel Act, unlike the Hobbs Act, punishes bribery (as well as extortion) that is "in violation of the laws of the State in which committed . . . ." 18 U.S.C. § 1952(b)(2). In charging the jury on the Travel Act counts, the district court stated that a Massachusetts statute, M.G.L. c. 268A § 2(b),[13] was the applicable state

[12] *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), which defendants cite, is inapposite. There the interstate movement of checks was solely within banking channels after the checks had been deposited and taken out of the control of the defendants. *Id.* at 1146. *Contra, United States* v. *Salsbury*, 430 F.2d 1045, 1048 (4th Cir. 1970), where even that limited activity was found to give rise to a violation of the Travel Act.

[13] Chapter 268A § 2 is directed in part against:

"(b) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility . . . ."

law and pointed out, quite properly, a distinction between the elements of extortion in the Hobbs Act counts, and the crime described in c. 268A § 2:

> "It is not necessary to show that there was any duress or compulsion with respect to the agreement to pay or the actual payment in that case. Of course if the transaction between Graham and Baptista does not rise above a voluntary payment upon the part of Graham, the defendants cannot be found guilty on Counts 3 or 5 [the Hobbs Act counts]. They can be found guilty upon Counts 4 and 6 [the Travel Act counts] insofar as the unlawful activity is concerned, namely the question of, to describe it briefly, the kickback, if you find that that has been proved to your satisfaction beyond a reasonable doubt."

In so charging, the court declined defendants' requested instruction, that they could be found guilty under the Travel Act counts only if the jury found that their actions constituted extortion.

We find no error. Conviction based on findings both of extortion and a violation of the Massachusetts statute would be perfectly consistent. It is true that one not guilty of extortion might still violate the statute. But the court took care of this possibility by explaining to the jury that if no more than a voluntary payment by Graham was found, there could be no Hobbs Act conviction. There was no prejudice in the submission, under the Travel Act, of the broader theory.

Defendants also allege a variance between the unlawful activity described in the Travel Act counts and the Government's proof. We find none. While the Travel Act counts initially refer to defendants' actions as "in furtherance of the plan and purpose" to commit the offenses charged in

the conspiracy and Hobbs Act counts, they go on to define the specific unlawful activity as the "solicitation, agreement to receive, and receipt of money . . . in return for a contract for engineering services with the New Bedford Redevelopment Authority." This language encompasses the crime set forth in the state statute cited at trial, c. 268A § 2, which is not limited to extortion. *See United States* v. *Nardello,* 393 U.S. 286 (1969).

Defendants also object to the application of M.G.L. c. 268A § 2 to Baptista, asserting that his authority as Executive Director was too slight to bring him within that statute. The statute punishes the solicitation or receipt of money by a public employee in return for being influenced in his performance either of any official act or any act within his official responsibility. *Id.* (b)(1). Defendants contend that Baptista lacked "official responsibility", defined in § 1(i),[14] as he was empowered only to assist and advise the Authority. Be that as it may, § 2(b)(1) also embraces "official act[s]", defined as "any decision or action in a particular matter[15] or in the enactment of legislation", § 1(h). Baptista's advice and assistance to the Authority, which defendants concede he was empowered to render, would clearly constitute "official acts" under c. 268A § 2(b)(1).

III

Defendant Hathaway contends that the verdict against himself, based in the substantive counts on the theory of

[14] Section 1(i) defines "official responsiblity" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove, or otherwise direct agency action."

[15] " 'Particular matter' [is] any . . . application, submission, request for a . . . contract . . . ." c. 268A § 1(k).

aiding and abetting, 18 U.S.C. § 2, were contrary to the weight of the evidence, and that the district court erred in denying his motions for judgment of acquittal and for a new trial. Hathaway says that there was no showing of the knowledge, intent, and participation requisite for a conviction.

To be convicted of aiding and abetting, it is necessary that a defendant in some way "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.), *quoted in Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949). Participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result. *Id.*

Hathaway paints himself as a shadowy figure, whom Graham never met or even knew existed. However, while there was some conflicting testimony as to his role,[16] we think the evidence supported a finding that he had knowingly and intentionally participated. Baptista furnished Graham with Hathaway's blank invoices, and Graham mailed checks made out to Hathaway, along with copies of the invoices, to Hathaway. Although none of the bank employees recalled cashing these specific checks, Hathaway was personally known to them, the checks were made payable to him, and his was the sole endorsement. It could be inferred that he alone cashed them. In addition, Baptista's secretary called the bank for Hathaway prior to his cashing checks. From these and related facts, the jury could conclude that there was no reasonable hypothesis

[16] There was evidence that Hathaway was hospitalized when one of the 1972 checks was cashed, and that the checks were sent to his former residence where no mail reportedly came for him during the years in question.

but that Hathaway was a willing participant in Baptista's scheme.

Hathaway contends that there could be no aiding and abetting as there was no showing of the commission of the crimes by a principal, it not having been established that Baptista obtained property or money from Meridian. However, Graham testified that Baptista told him he received the first payment. And even were this not so, as the checks were cashed by Baptista's personally designated associate, the jury could infer that the benefit was passed on to the principal. *See United States* v. *Provenzano,* 334 F.2d 678, 686 (3d Cir. 1964).

We likewise reject Hathaway's argument that his conviction as an aider and abettor cannot stand since there was no public officer who acted as principal. As previously discussed, the evidence on this score was adequate as to Baptista.

IV

Defendants contend that the court improperly refused their requested instructions on the two conspiracy counts.[17] They concede that the more general instruction along the

[17] Defendants were charged in separate counts with conspiracy in violation of the Hobbs Act, 18 U.S.C. § 1951, and under the Travel Act, 18 U.S.C. § 1952, and 18 U.S.C. § 2 in violation of 18 U.S.C. § 371.

They requested the following instructions:

> "23. Evidence of the presence of the Defendant Hathaway in the office of the New Bedford Redevelopment Authority or in the office of the Defendant Baptista on one or more occasions does not establish proof of the existence of a conspiracy between the defendants.
>
> 24. Evidence that the Defendant Baptista was in the Southeastern Bank and Trust Company on one or more occasions when the Defendant Hathaway cashed a check there does not establish proof of the existence of a conspiracy between the defendants."

same lines which the court gave [18] was correct, but contend that it should have gone further to guard against the Government's purported attempt to prove conspiracy by association alone. However, the Government's proof went well beyond mere association, and association, while not dispositive, is at least relevant. *See United States* v. *Armone,* 363 F.2d 385, 403-04 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966). The court correctly cautioned the jury against paying excessive attention to such evidence. There was no error.

Defendants also contend that the evidence was insufficient to prove an agreement. We disagree. While there was no direct proof of an agreement, there was circumstantial evidence of one. The availability of the blank invoices and the cashing of the checks give rise to the strong inference that Hathaway and Baptista were working in combination, pursuant to a criminal agreement. The jury could infer that Hathaway knew all along of the use to which Baptista would be putting the blank invoices and that the agreement therefore predated the June, 1971, meeting between Baptista, Graham, and Lucas.[19]

[18] The instruction given was:

> "Mere association of two persons, the mere presence of one so-called conspirator with another is not enough to prove conspiracy. The acts and conduct of the alleged conspirators must furnish to the jurors for their consideration and for their determination evidence which justifies them in finding intention upon the part of the conspirators to participate in the agreement to commit a crime and to accomplish an unlawful purpose. Mere association or presence of one with the other at any time, at any time during the period of time alleged in the indictment, is not by itself sufficient and it must be the acts and conduct of the defendants, the circumstances under which they acted that can provide for the jury the basis of their determination."

[19] Defendants assert a fatal variance because the indictment alleges that the conspiracy began in May, 1971, and there was no proof of that precise date of its commencement. However, the conspiracy was within the period charged and any discrepancy was insubstantial. *See United States* v. *Postma,* 242 F.2d 488, 496-97 (2d Cir.), *cert. denied,* 354 U.S. 922 (1957).

As regards each of the two conspiracy counts, defendants contend that at the very most the Government proved conspiracy only in 1972 and not continuing from May, 1971, to December, 1972, as alleged in the indictment. They assert that they were therefore prejudiced by the district court's refusal to require the Government to elect between the separate 1971 and 1972 conspiracies, since the indictment was duplicitous and there was a variance from the indictment as charged. However, we think the evidence was sufficient to show a continuing conspiracy covering both years. The same method of payment was used in both 1971 and 1972; the same parties were involved; the payments were made for the same purpose, procuring engineering contracts from the Authority; and during the meeting in June, 1971, Baptista spoke of the forthcoming NDP project and said that Meridian might be considered. The discontinuity in time between the last WEP payment, in November, 1971, and the meeting about the NDP contract in August, 1972, does not necessarily divide this continuing mode of operation into separate conspiracies. *Compare United States* v. *Russano,* 257 F.2d 712 (2d Cir. 1958).

V

Finally we deal with defendants' claims of error as to several rulings, the first of which dealt with the right to cross-examine Graham. The Government interrupted its direct examination of Graham in order to call other witnesses. This was done to conform to the district court's requirement that the Government submit all its evidence of conspiracy before submitting any coconspirators' declarations. The court adopted this order of presentation so as to make sure that the quantum of independent non-hearsay evidence was adequate to support the required elements of the conspiracy and defendants' participation in it. *Cf. United States* v. *Honneus,* 508 F.2d 566, 577 (1st Cir. 1974),

cert. denied, 421 U.S. 948 (1975) (requiring a timely limiting instruction, though not necessarily this order of presentation).

Defendants did not object during the trial either to the order of proceeding or to the court's accompanying rulings and instructions. Now, however, they assert that the court erred by limiting the defense to a single opportunity to cross-examine Graham, and further, that it was plain error to have announced a cut off in the non-hearsay proof prior to Graham's cross-examination. Whatever the pros and cons of the procedure, it was well within the court's discretion so to structure the admission of evidence. The object was not to invite a final determination of guilt or innocence at the conclusion of the Government's non-hearsay case in chief, but rather to protect each defendant against premature jury exposure to the declarations of coconspirators. At the close of trial, by which time Graham had been fully cross-examined, the jury was instructed at great length concerning its duty to weigh the credibility of witnesses and was, of course, told to acquit if not satisfied of guilt beyond a reasonable doubt; it was also instructed then, as earlier, of the need for independent proof of the conspiracy and of defendants' involvement.

It is true that the court's limiting instructions after completion of the Government's non-hearsay case did not expressly tell the jury to consider the cross-examination yet to come when weighing the Government's proof on the hearsay counts. But counsel did not request any such instruction or raise any objection, and we cannot discern plain error either in what the court said or did not say at the time. Fed. R. Crim. P. 52(b).

Defendants also argue that the district court improperly excluded cancelled checks from another company, the Cam-

panella Corp., which had been cashed by Hathaway at the Southeastern Bank. We find no error in the court's exclusion of the proferred evidence as irrelevant or, at least, so marginal that any possible relevance was outweighed by its tendency to mislead and confuse. Fed. R. Evid. 403.

VI

Defendants also seek to assert alleged improprieties in the grants of immunity to four Government witnesses. *See* 18 U.S.C. § 6003. The short answer is that a challenge to a grant of immunity, like assertion of the privilege against self-incrimination, is personal; defendants are without standing to contest the legal sufficiency of the granting of immunity by the Government to these witnesses. *United States* v. *Lewis,* 456 F.2d 404, 408-10 (3d Cir. 1972); *cf. Lopez* v. *Burke,* 413 F.2d 992, 994 (7th Cir. 1969). *See also United States* v. *White,* 322 U.S. 694 (1944); *Hale* v. *Henkel,* 201 U.S. 43 (1906); *United States* v. *LePera,* 443 F.2d 810, 812 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971); *Long* v. *United States,* 360 F.2d 829, 834 (D.C. Cir. 1966); *United States ex rel. Berberian* v. *Cliff,* 300 F. Supp. 8, 14-15 (E.D. Pa. 1969).

We also find no reversible error in the court's handling of the controversy that surfaced early in the trial concerning nondisclosure of a Government letter promising not to prosecute Meridian employees. The court has discretion in the handling of alleged noncompliance with discovery orders, Fed. R. Crim. P. 16(d)(2), and we find no such evidence of deliberate Government misconduct or prejudice as to require a different disposition from that adopted by the court.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1353.

UNITED STATES OF AMERICA,
Appellee,

v.

HOWARD BAPTISTA,
Defendant, Appellant.

JUDGMENT

Entered March 24, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

vs

HOWARD J. BAPTISTA

CRIMINAL NO. 75-140-M

JUDGMENT AND COMMITMENT

On this 11th day of September, 1975 came the attorney for the government and the defendant appeared in person and by Morris Goldings, counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and verdicts of guilty has been convicted of the offense of knowingly, wilfully and unlawfully combining, conspiring, and agreeing with others to commit offenses against the United States in that he did agree with others to obstruct, delay and affect interstate commerce and did do so by extorting money which was induced by the wrongful use of fear and under color of official right, in violation of 18 USC 1951, as charged in count I; conspiring with others to cause others to travel in interstate commerce and to utilize the facilities in interstate commerce to carry on an unlawful activity, in violation of 18 USC 371, as charged in count II; knowingly, wilfully and unlawfully attempting to obstruct, delay and affect interstate commerce by extortion induced by the wrongful use of fear and under color of official right, in violation of 18 USC 1951 and 2, as charged in counts III and V; knowingly, wilfully and unlawfully causing others to travel in interstate commerce

and to utilize the facilities in interstate commerce to carry on an unlawful activity, in violation of 18 USC 1952 and 2, as charged in counts IV and VI and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years, the first six (6) months to be served in a jail-type institution, the balance suspended and defendant placed on probation for a period of eighteen (18) months, and defendant ordered to pay a fine in the amount of $1,000 on each count, for a total of $6,000.00.

It Is Adjudged that the execution of the sentence is stayed pending appeal.

/s/ FRANK J. MURRAY
United States District Judge

I hereby attest and certify on Sept. 12, 1975 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

GEORGE F. McGRATH
Clerk, U.S. District Court
District Of Massachusetts
By: ANN DOHERTY, Deputy

Relevant Statutes.

18 U.S.C. § 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

18 U.S.C. § 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

18 U.S.C. § 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. § 6003. *Court and grand jury proceedings*

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

18 U.S.C. § 2514. *Immunity of witnesses*

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

HOWARD BAPTISTA, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN HATHAWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (No. 75-1528 Pet. App. 1-28; No. 75-1529 Pet. App. D) is reported at 534 F. 2d 386.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1976. The petition for a writ of certiorari in No. 75-1528 was filed on April 22, 1976, and the petition in No. 75-1529 was filed on April 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner Hathaway's conspiracy convictions.

2. Whether the trial court erred in instructing the jury that a violation of the Travel Act, 18 U.S.C. 1952, could be predicated in part upon proof of voluntary bribery payments to a public official, where other counts of the indictment alleged that the payments were the product of "extortion" under the Hobbs Act, 18 U.S.C. 1951.

3. Whether the trial court erred in instructing the jury regarding the interstate travel requirement of the Travel Act.

4. Whether petitioners were denied due process by the trial court's grant of immunity to four prosecution witnesses.

5. Whether petitioners were denied due process by the government's alleged failure to comply fully with a pretrial discovery order.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted on two counts of obstructing interstate commerce through extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Counts III and V), on one count of conspiring to commit that substantive offense, in violation of the same statute (Count I), on two counts of causing others to travel and utilize facilities in interstate commerce to facilitate unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952 (Counts IV and VI), and on one count of having conspired to violate the Travel Act, in violation of 18 U.S.C. 371 (Count II). Petitioner Baptista was fined $1,000 on each of the six counts and was sentenced to two years' imprisonment, with all but six months of that term

suspended in favor of eighteen months' probation. Petitioner Hathaway was fined $2,000 on each of the six counts and was sentenced to two years' imprisonment, with all but four months of that term suspended in favor of twenty months' probation. The court of appeals affirmed in a comprehensive opinion (No. 75-1528 Pet. App. 1-28; No. 75-1529 Pet. App. D).

In June 1971, petitioner Baptista, the executive director of the New Bedford Redevelopment Authority ("Authority"), met with Thomas Graham, the chairman of the board of Meridian Engineering, Inc. ("Meridian"), to discuss the possible award to Meridian of a contract with the Authority for a $230,000 construction project (I Tr. 34-35, 43, 51). At this meeting, Baptista arranged to insure that Meridian would receive the contract in exchange for a kickback to himself of $25,000 (I Tr. 50-54). Graham agreed to the payment because he believed that the contract would not be awarded to Meridian unless the payment was made (V Tr. 95).

The payment to Baptista was disguised through the use of fraudulent invoices obtained from the firm of petitioner Hathaway. The invoices from Hathaway's firm were completed by Graham to state that Hathaway had provided services and equipment to Meridian, although no such services were rendered by Hathaway. Graham would then authorize payments from Meridian in accordance with the fraudulent invoices, resulting in payments to Hathaway and, through him, to Baptista. Baptista suggested this procedure at the meeting and provided Graham with blank invoices to use in making the payments (I Tr. 50-54).

The $25,000 payment was subsequently made in a series of four corporate checks payable to Hathaway and mailed by Meridian from its office in Pennsylvania to

Hathaway in Massachusetts. The first check was mailed in July 1971, and Baptista subsequently informed Graham that the procedure was satisfactory and that the first check had been received (I Tr. 63-70, 92-93; III Tr. 129-130).

In August 1972, Graham and Baptista made a similar arrangement involving a smaller construction contract with the Authority (I Tr. 108-109; V Tr. 98-102). For this contract, a $5,000 kickback to Baptista was agreed upon, and Baptista again provided Graham with blank invoices from Hathaway's firm with which to disguise the payment (I Tr. 113-114; V Tr. 98-102). Once again, Graham believed that the contract would not be awarded to Meridian if he did not agree to make the $5,000 payment to Baptista (V Tr. 101-102). This payment was subsequently made in the same manner as the initial $25,000, with Meridian mailing to Hathaway four corporate checks prepared in accordance with the fraudulent invoices prepared by Graham (III Tr. 107-108).

All the checks sent to Hathaway by Meridian were cashed at the Southeastern Bank in New Bedford, Massachusetts, and all were endorsed only in the name of the payee, Stephen Hathaway. Hathaway, who did not have an account at that bank, was approved for large check cashing privileges there by Baptista, an officer of the bank, who introduced Hathaway to the bank manager (V Tr. 69-71).

Hathaway cashed a number of checks at that bank, varying in amount between $200 and $20,000 (III Tr. 184-185, 193-194). Normally, Baptista's secretary telephoned ahead to the bank so that the cash would be ready when Hathaway arrived at the bank (III Tr. 193-194).

The head teller at the bank cashed a number of checks for Hathaway, including two checks from Meridian

(IV Tr. 13-27). On one of these occasions the head teller observed Hathaway talking to Baptista in the bank (V Tr. 62-65).

ARGUMENT

1. Petitioner Hathaway contends (Pet. 10-18) that the evidence was insufficient to support his conspiracy convictions because there was no direct evidence of an agreement between himself and Baptista. The agreement which is the essential element of a conspiracy, however, need not be established by direct evidence, or be shown to have been explicit, but can be inferred from the facts and circumstances of the case. *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10; *United States* v. *Miller*, 508 F. 2d 444 (C.A. 7); *United States* v. *Flaxman*, 495 F. 2d 344 (C.A. 7), certiorari denied, 419 U.S. 1031.

There was ample circumstantial evidence of an agreement in this case. Not only did Baptista provide Graham with Hathaway's invoices and direct that payment be made in that manner, but he aided Hathaway in cashing the checks at his bank. Hathaway cashed checks mailed to him by Meridian,[1] and Baptista told Graham that the procedure was satisfactory and that the first payment in connection with the $25,000 kickback had been received. As the court of appeals properly concluded (Pet. App. 25-26),[2] the evidence, when viewed in the light most favorable to the government, provided sufficient support

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[1]Contrary to petitioner Hathaway's suggestion (Pet. 17), a bank teller did identify him as the individual who cashed several Meridian checks (IV Tr. 13-27).

[2]Hereinafter "Pet. App." refers to the appendix to the petition in No. 75-1528.

for the jury's finding that Hathaway was participating in the scheme as a conduit for the transmission of the illegal proceeds to Baptista. See *Glasser* v. *United States*, 315 U.S. 60, 80.[3]

2. Petitioners assert (No. 75-1528 Pet. 16-18; No. 75-1529 Pet. 23-25) that the trial court erred in instructing the jury that they could be convicted under the Travel Act, 18 U.S.C. 1952, upon proof of voluntary payment of bribes. Petitioners do not challenge the instruction in and of itself. Rather, they argue that, since the Hobbs Act counts of the indictment required proof of "extortion," the jury instruction under the Travel Act was improper because it allowed the government "to proceed on inconsistent theories" of proof.

The Travel Act, unlike the Hobbs Act, punishes bribery (as well as extortion) that is "in violation of the laws of the State in which committed." 18 U.S.C. 1952(b)(2). In charging the jury on the Travel Act counts, the district court stated that a Massachusetts statute (Mass. Gen. Laws, c. 268A, §2(b) (1964)),[4] was the applicable state law,

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[3]The cases cited by petitioner Hathaway (Pet. 11-18) do not conflict with the holding of the court below. Rather these cases involve only the question whether the evidence in each particular case, when assessed under settled principles of law, constituted sufficient evidence of a conspiracy.

[4]This statute is directed in part against:

> Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for
>
> (1) being influenced in his performance of any official act or any act within his official responsibility * * *

and distinguished between the elements of extortion under the Hobbs Act, and the crime defined by the Massachusetts statute, which does not require a finding of extortion. The district court instructed (see Pet. App. 21):

> It is not necessary to show that there was any duress or compulsion with respect to the agreement to pay or the actual payment in that case. Of course if the transaction between Graham and Baptista does not rise above a voluntary payment upon the part of Graham, the defendants cannot be found guilty on Counts 3 or 5 [the Hobbs Act counts]. They can be found guilty upon Counts 4 and 6 [the Travel Act counts] insofar as the unlawful activity is concerned, namely the question of, to describe it briefly, the kickback, if you find that that has been proved to your satisfaction beyond a reasonable doubt.

As the court of appeals correctly held, this instruction did not prejudice petitioners (Pet. App. 21); the offenses of bribery and extortion, as those terms are defined by the state statute and the Hobbs Act, respectively, are not mutually exclusive:

> Conviction based on findings both of extortion and a violation of the Massachusetts statute would be perfectly consistent. It is true that one not guilty of extortion might still violate the [state] statute. But the court took care of this possibility by explaining to the jury that if no more than a voluntary payment by Graham was found, there could be no Hobbs Act

conviction. There was no prejudice in the submission, under the Travel Act, of the broader theory.[5]

3. Petitioners assert (No. 75-1528 Pet. 11-16; No. 75-1529 Pet. 25-31) that the trial court also erred in instructing the jury that the interstate travel element of the Travel Act need not be established by showing the use of interstate facilities by petitioners themselves, but would be satisfied if petitioners "caused or induced" Graham to travel interstate or to use the mail.

The court's instruction correctly stated the applicable law. The Travel Act makes it unlawful to use any facility in interstate commerce, including the mail, to distribute the proceeds of any unlawful activity or otherwise to facilitate the carrying on of any unlawful activity; in turn, 18 U.S.C. 2 provides that whoever induces the commission of an offense is punishable as a principal. Accordingly, the Travel Act may be violated where the interstate travel or the use of the interstate facility is by the individual who has acceded to the bribery demands of the defendant, providing the defendant caused the

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[5]Indeed, the instruction may have been more favorable to petitioners than that to which they were entitled under the Hobbs Act. The definition of "extortion" under the Hobbs Act includes the act of obtaining property from another, with the consent for the payment having been "induced * * * under color of official right." 18 U.S.C. 1951(b)(2). Since inducement under the color of official right need not involve coercion, payments "extorted" by a public official through the wrongful use of his office may be "voluntarily" made in the sense that the initiative for the payment may come from the payor. See Pet. App. 11; *United States* v. *Trotta*, 525 F. 2d 1096 (C.A. 2), certiorari denied, May 19, 1976 (No. 75-1032); *United States* v. *Mazzei*, 521 F. 2d 639, 644-645 (C.A. 3), certiorari denied, 423 U.S. 1014; *United States* v. *Braasch*, 505 F. 2d 139 (C.A. 7), certiorari denied, 421 U.S. 910. But, in any event, petitioners' contention that the court's instruction allowed the government to proceed on inconsistent theories is incorrect.

travel or usage. See *United States* v. *DeCavalcante*, 440 F. 2d 1264, 1268 (C.A. 3); *United States* v. *Marquez*, 449 F. 2d 89 (C.A. 2), certiorari denied, 405 U.S. 963. *Rewis* v. *United States*, 401 U.S. 808, is not to the contrary. In *Rewis* this Court held that Congress did not intend the Travel Act to apply to criminal activity solely because that activity is at times patronized by persons of another State. 401 U.S. at 811-812; but see 401 U.S. at 813-814. But the interstate nexus here involves much more than travel by one for the purpose of patronage. The mailing of the checks by Meridian from its principal office in Pennsylvania to Hathaway in Massachusetts constituted the very essence of the scheme. These mailings were caused by petitioners, who arranged the method of payment. As the court of appeals correctly pointed out (Pet. App. 19-20):

> [E]vidence of Meridian's prearranged use of the mails to forward checks to defendants strongly supported a jury finding of a requisite interstate activity. When Baptista gave Graham the blank invoices for the purpose of making payments, he knew that Meridian was a Pennsylvania-based company and that the addresses on the invoices were in Massachusetts. This use of the mails was more than "incidental", *United States* v. *Isaacs*, 493 F. 2d 1124, 1146-49 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), for it was an important link in the interchange between defendants and Meridian. *Cf. United States* v. *Hedge*, 462 F. 2d 220, 223-24 (5th Cir. 1972). While the Travel Act is to be construed narrowly, see *Rewis* v. *United States*, this conduct falls squarely within the language of 18 U.S.C. §1952. *See United States* v. *Archer*, 486 F. 2d 670 (2d Cir. 1973).

4. Petitioners also contend (No. 75-1528 Pet. 18-22; No. 75-1529 Pet. 18-23) that they were denied due process on the ground that the grant of immunity to four

prosecution witnesses did not comply with the requirements of 18 U.S.C. 6003. But the procedure followed in the issuance of the immunity orders in this case fully complied with the requirements of that statute. The orders were properly issued upon the request of the United States Attorney following the approval of the designated Assistant Attorney General.

In any event, a challenge to the validity of a grant of immunity, like the assertion of the privilege against self-incrimination, is personal to the witness, and petitioners have no standing to contest the legal sufficiency of the immunity orders issued in this case. See *United States* v. *Braasch, supra,* 505 F. 2d at 146-147; *United States* v. *Lewis,* 456 F. 2d 404 (C.A. 3); *Lopez* v. *Burke,* 413 F. 2d 992 (C.A. 7); *Bowman* v. *United States,* 350 F. 2d 913, 915-916 (C.A. 9).

5. Petitioners also argue (No. 75-1528 Pet. 18-19; No. 75-1529 Pet. 18-19) that they were denied due process by the action of the trial court permitting the four witnesses to testify despite the failure of the government to comply fully with a pretrial discovery order requiring disclosure of any promises that had been made to encourage testimony of government witnesses.

While the actual immunity orders were not issued until the second day of trial, the government allegedly violated the district court's discovery order by failing to reveal prior to trial the existence of a letter to the witnesses' attorney stating that the government intended not to prosecute these individuals (II Tr. 23-29). But petitioners were aware both of the letter and of the immunity orders before any of these witnesses testified, and petitioners were therefore able effectively to exercise their right to cross-examine the witnesses in this regard (II Tr. 45, 69, 122; III Tr. 67). Under these circumstances, petitioners

are unable to show prejudice, and the courts below were therefore correct to dismiss petitioners' contention. As the court of appeals held (Pet. App. 28), "[t]he [district] court has discretion in the handling of alleged non-compliance with discovery orders, Fed. R. Crim. P. 16(d)(2), and we find no such evidence of deliberate Government misconduct or prejudice as to require a different disposition from that adopted by the [district] court."

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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